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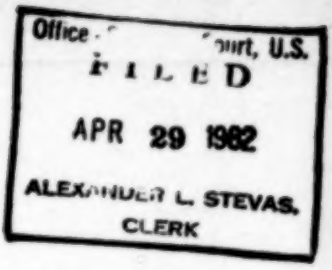

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NORMAN LEON GUTHERY,
PETITIONER

VS.

RITA GUTHERY,
RESPONDENT

WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

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QUESTION PRESENTED FOR REVIEW

This Court is asked to review decision by the Alabama Court of Civil Appeals, certiorari denied by the Alabama Supreme Court, which deprived Appellant of his right to an unbiased trial judge in a divorce case which is required by the applicable statutes in the State of Alabama.

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OPINIONS BELOW

The opinion of the court below, the Court of Civil Appeals of Alabama is reported as Guthery v. Guthery, Alabama Civil Appeals 409 So. 2d 844 (1982). The Circuit Court of Morgan County, Alabama did issue a decree. A copy of the opinion of the Court of Civil Appeals of Alabama is attached as Appendix B and a copy of the decree of the Circuit Court of Morgan County, Alabama is attached as Appendix C.

JURISDICTION

Appellant seeks to review denial or Writ of Certiorari by the Alabama Supreme Court on January 29, 1982, Writ was to the Alabama Court of Civil Appeals regarding its decision of November 4, 1981. The Alabama Court of Civil Appeals in this decision on November 4, 1981 reports as Guthery v. Guthery, Ala. Civ. App. 409 So. 2d 844, affirmed the lower court's decision, the Morgan County Circuit Court, and held that the trial court had not violated the Alabama Canons of Judicial Ethics, Canon 3(c)(1)(d) regarding the impropriety of a trial judge to hear a case in which certain relatives of the judge acted as an attorney.

The Supreme Court of Alabama made final the judgment of the Court of Civil Appeals which upheld the trial court's decision. Appellant did not file a motion for rehearing in the Supreme Court of Alabama because such a motion will not be received by that court when the subject is the motion is an order denying certiorari, Alabama Rules of Appellate Procedure 39(j).

On April 24, 1982 counsel for appellant filed a notice of appeal to the Supreme Court of the United States and to the Supreme Court of Alabama, and in the Court of Civil Appeals of Alabama, mailed the same to counsel for Appellee and has mailed the same to this Court along with his appearance.

This court's jurisdiction is invoked under 28 USC 1257(3). Cases which sustain this jurisdiction include: Stanton vs. Stanton, 421 US 7 (1975); Stanley vs. Illinois, 405 US 645 (1972); Reed vs. Reed, 404 US 71 (1971); and Levy vs. Louisiana, 391 US 68 (1968).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment XIV, Section 1, provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privleges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Alabama Canons of Judicial Ethics, Canon 3(c)(d)(i)(ii):

"A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(d) He or his spouse, or a person within the fourth degree of relationship to either of them, or spouse of such a person: (i) is named a party to the proceeding, or an officer, director or a trustee of a party. (ii) is known by the Judge to have an interest that could be substantially effected by the outcome of the proceeding."

STATEMENT OF THE CASE INCLUDING A RAISING AND RULING UPON THE FEDERAL QUESTION

This proceeding began in the Circuit Court of Morgan County, Alabama as a divorce action and the case was heard by Judge Tom B. Coggin and the Appellee was represented by Honorable Sherman B. Powell, Jr. After the divorce action and after various post trial

hearings and petitions Appellant raised the issue of a violation of the Alabama Canons of Judicial Ethics, supra. A subsequent trial judge denied Appellant relief and the matter was appealed to the Alabama Court of Civil Appeals which by its decision cited above affirmed the trial court's decision.

The Alabama Court of Civil Appeals noted that "Clearly in this case, the judge was disqualified to serve because he was related to the attorney within the proscribed degree and owned property jointly with him. The only way this disqualification can be remitted is for the judge to fully disclose his disqualification in the record and for the parties to agree to writing to allow him to hear the case. In the instant case the parties and their

attorneys were informed in open court of the disqualification, and the Appellant through his attorney agreed for the judge to hear the case. The agreement, however, was not reduced to writing"

Appellant raised the issue of the constitutional violation in this case in his belief to the Alabama Court of Civil Appeals, the Alabama Court of Civil Appeals made no mention of the issue of the constitutional violation in their opinion.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

This Court has apparently never ruled upon the question presented in this case. The comparable federal statute is found at 28 USC § 455 and

has been ruled upon by the Fifth United States Circuit Court of Appeals in the cases of Potashnick vs. Port City Const. Co., 609 F. 2d 1101, rehearing denied 613 F. 2d 314 and Port City Const. Co. v. City of Mobile, Al., 613 F. 2d 314, certiorari denied 101 S. Ct. 78. Fifth Circuit decided that the Appellant was entitled to a fair and impartial judge who was not kin to the parties involved and reversed a rather substantial matter involving multiple parties and great expense.

Simply stated, Appellant's argument is that the record reveals no waiver from him and the record shows there was no written agreement by the parties as required by the applicable Canon of Judicial Ethics

and Appellant contends that showed a violation of his rights guaranteed by the fourteenth amendment, supra.

CONCLUSION

The question presented in this appeal is substantial and of public importance and therefore required plenary consideration, with brief on the merits and oral arguments, for its resolution.

Respectfully submitted,

/s/ John L. Sims

JOHN L. SIMS